

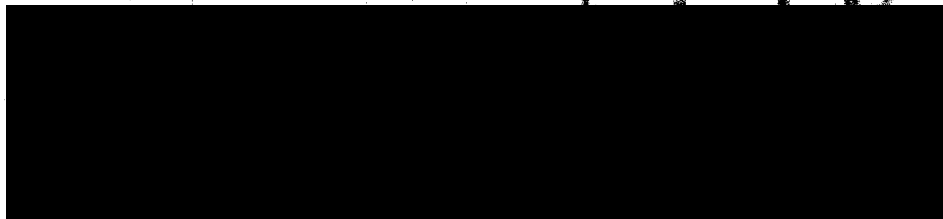
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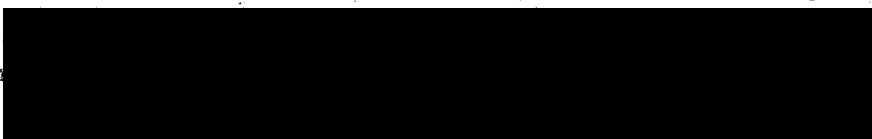
**U.S. Citizenship
and Immigration
Services**



FILE: SRC 02 115 53016 Office: TEXAS SERVICE CENTER Date: **OCT 01 2004**

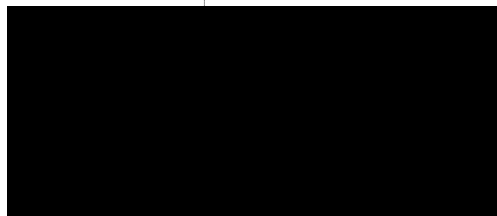
IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Texas in February 2000. It is a business broker for international clients. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary had been employed in a managerial or executive capacity for the foreign entity or would be employed in a managerial or executive capacity for the United States entity.

On appeal, counsel for the petitioner submits a brief in response to the director's decision.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary's assignment for the petitioner will be primarily managerial or executive.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an attachment to the February 2002 Form I-140, Immigrant Petition for Alien Worker, the petitioner stated that the beneficiary's position was as its president and that his responsibilities included:

In this managerial position, [the beneficiary] will continue to manage, supervise, and operate, with the assistance of a staff, the business in the United States. He will also continue [to] direct the training of United States employees who will be employed by the company in the near future to staff the Texas office.

The petitioner indicated on the Form I-140 petition that it employed three individuals.

On August 24, 2002, the director requested additional evidence including: (1) the petitioner's organizational chart, a brief description of each employee's duties, and evidence of wages paid to employees; and, (2) additional details regarding the beneficiary's position and the percentage of time spent on the various duties.

In response, the petitioner stated that the beneficiary spent 60 percent of his time on "Commercial Management: Customer and suppliers attention;" and 40 percent of his time on "Administrative Management: Finance, accountant and employees attention." The petitioner provided a list of the beneficiary's general duties as follows:

- The supervision of all employees or future employees employed with the company;
- Training of employees (hiring and firing of employees);
- Managing United States office finances;
- Planning, developing [,] implementing company strategies;
- Developing and implementing policies and procedures for company operations;
- Determining mark-up percentages necessary to insure profit, based on estimated budget, profit goals and average rate of client acquisition;
- Developing policies and procedures for procurement of services;
- Oversee the negotiating of contracts with service providers;
- Authorizing purchase of equipment based on estimates;
- Formulating pricing policies for sale of equipment;
- Reviewing statements, invoices and insurance certificates;
- Coordinate the purchase of safety and environmental; supervising the contact with the different vendors to attain the desired equipment. The President must travel frequently to maintain business relations with vendors and clients;
- Plan business objectives, develop organizational policies and establish responsibilities and procedures for attaining objectives;
- Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions;
- Evaluates market for new profitable opportunities in order to attain established policies an [sic] objective of the company;
- Plan and implement new operating procedures to improve efficiency and reduce cost.

The petitioner also submitted brief job descriptions for an administrative assistant, marketing assistant, and secretary/receptionist. The petitioner also provided copies of its employees' wage records. The records showed that the individual identified as the secretary/receptionist was first paid in March 2002; the individuals identified as the administrative assistant was first paid in July 2002; and, the individual identified as the marketing assistant was first paid in October 2002.

The director determined that the beneficiary's daily duties largely consisted of the tasks necessary to produce a product or provide the services of the organization. The director also observed that the record did not establish that the beneficiary supervised managerial or professional employees; but rather functioned as a first-line supervisor. The director concluded that the petitioner had not established that the beneficiary was eligible for the I-140 managerial/executive visa classification.

On appeal, counsel for the petitioner asserts that the beneficiary functions both as an executive and manager. Counsel questions the director's review of the petitioner's type of business as the director determined that the beneficiary's tasks included providing both "goods" and "services." Counsel finally referred to Citizenship and Immigration Services (CIS) previous approvals of the beneficiary's L-1A intracompany transferee classification.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

The petitioner has provided, in part, a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include: "Planning, developing [,] implementing company strategies," and "Developing and implementing policies and procedures for company operations," and "Developing policies and procedures for procurement of services," and "Plan[ing] business objectives, develop[ing] organizational policies and establish[ing] responsibilities and procedures for attaining objectives;" and "Plan[ing] and implement[ing] new operating procedures to improve efficiency and reduce cost." The petitioner does not, however, further define the policies, procedures, strategies, and objectives. The petitioner does not clarify who carries out or implements the petitioner's policies, procedures, strategies, and objectives. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner describes the beneficiary as managing the petitioner's finances, determining price mark-ups, authorizing purchases, supervising contracts with vendors, traveling to maintain business relations, and reviewing activity reports and financial statements. The beneficiary is the individual performing all the duties relating to these operational activities. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The director's determination that the beneficiary's tasks comprised tasks necessary to produce a product or to provide the organization's services is accurate. As described by the petitioner and counsel, the organization's business is to perform the services of a broker. The beneficiary, as the individual setting prices, authorizing purchases, and maintaining business relations, is the individual providing the company's brokering services, the petitioner's sole product.

Even though the petitioner claims that the beneficiary supervises and trains employees, the petitioner has not provided any evidence that it actually employed individuals other than the beneficiary when the petition was filed. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. Moreover, as observed above, the petitioner's payroll records for its first employee, a secretary/receptionist do not begin until one month after the petition was filed. The petitioner's administrative assistant was not paid until July 2002 and the marketing assistant was not paid until October 2002. Thus, when the petition was filed in February 2002, the record establishes only that the beneficiary was the petitioner's sole employee. The beneficiary, as a matter of necessity, would have been the only individual providing the petitioner's administrative, marketing, and brokering services to third parties. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In sum, the petitioner has not established that the beneficiary's primary assignment will be managerial or executive.

Counsel's implicit assertion that the past approvals of the beneficiary's status as an L-1A intracompany transferee require the approval of this petition is not persuasive. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same evidence provided in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International, supra*. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The second issue in this proceeding is whether the beneficiary's assignment for the foreign entity was in a managerial or executive capacity. The petitioner initially stated that the beneficiary had been the foreign entity's general manager for three years prior to entering the United States as a nonimmigrant. The petitioner indicated that the beneficiary supervised and oversaw the foreign entity's business activities as the general manager.

The director requested additional information regarding the beneficiary's daily duties for the foreign entity and the number and positions of the people he supervised.

In response, the petitioner provided a similarly general description of the beneficiary's foreign duties as provided for his duties in the United States. The petitioner supplied the foreign entity's organizational chart circa 1999 that showed a secretary, an administrative manager, a technical manager and two technical assistants, and an accountant in addition to the beneficiary's position as general manager.

The director again determined that the description of the beneficiary's duties showed that the beneficiary's duties consisted of duties necessary to provide the foreign entity's product or services. The director also determined that the record did not establish that the beneficiary had supervised or managed managerial or professional employees.

Counsel asserts that the director's decision is erroneous and that the director mis-analyzed the evidence and based her decision on assumptions. Counsel does not further address the director's decision on this issue.

Counsel does not specifically identify the "mis-analyzed" evidence relating to the beneficiary's foreign employment and does not further clarify the purported assumptions relied upon by the director. The AAO observes that the record does not establish that the beneficiary's employment with the foreign entity comprised primarily managerial or executive duties. The description of duties again, is general and, at most, shows that the beneficiary is involved in the day-to-day non-qualifying duties of the foreign entity. The record does not provide independent evidence of the employment of the individuals in positions subordinate to the beneficiary. Further, the record does not provide information regarding the duties of the subordinates. The AAO cannot conclude from the limited information presented that the beneficiary's assignment for the foreign entity was primarily managerial or executive.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.